

No. 45442-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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WAL-MART STORES, INC.,

Plaintiff-Appellant

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL  
UNION; ORGANIZATION UNITED FOR RESPECT AT WALMART,  
and DOES I-X,

Defendants-Appellees

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**APPELLEES' ANSWERING BRIEF**

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## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF THE CASE	4
III. ARGUMENT	5
A. IN THE CONTEXT OF THIS CASE, THE NATIONAL LABOR RELATIONS ACT AND THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION PREEMPT WALMART'S LAWSUIT.	5
1. Here, Walmart implicitly recognized the Labor Board's jurisdiction.	5
2. The NLRA preempts Walmart's lawsuit because the NLRA "arguably prohibits" the events at issue in Walmart's lawsuit.	8
a. Where, as here, the focus of the Labor Board charge and the state lawsuit are substantially identical, the state unit is preempted.	8
b. The Superior Court correctly held that the NLRA preempts Walmart's lawsuit because Walmart's Labor Board charge and lawsuit share substantially identical matters.	15
i. The legal theory of Walmart's Labor Board charge is the same as its lawsuit theory	17
ii. The theory of Walmart's trespass lawsuit is the same	19
iii. The remedy for Walmart's Labor Board charge is the same as the remedy Walmart sought in its lawsuit	22

iv. Walmart relies on the same allegations, facts and evidence in its lawsuit and Labor Board charge	24
c. The Superior Court correctly prohibited Walmart from attempting to avoid preemption by arguing that it withdrew most of its Labor Board allegations or that the Labor Board later dismissed the remaining allegations.	27
d. Walmart's trespass claim does not fit the "deeply rooted local interes' exception to the NLRA preemption because the exception applies only to violent conduct or threats and not simple trespass without more.	29
i. The "deeply rooted local interest" exception applies only to conduct involvinig violence, property destruction, and imminent threats of physical or mental injury.	29
ii. The deeply rooted exception applies to violent conduct because the NLRA does not protect violent conduct.	34
iii. Walmart's evidence proves that Appelless conducted events in a peaceful, non-threatening, orderly and non-disruptive manner.	34
iv. <i>Sears</i> held that the NLRA did not preempt the trespass lawsuit not because trespass is a deeply rooted exception but because the lawsuit and the NLRA violation did not share substantially identical matters.	41
v. Courts hold that the NLRA preempts trespass lawsuits.	42

vi. Concerns over property rights do not come within the deeply rooted exception to the NLRA preemption rule.	43
vii. The trial court correctly held the suit preempted and therefore correctly did not reach the motion to strike under the Anti-SLAPP statute.	46
B. SHOULD THIS COURT HOLD THAT THE STATE TRESPASS CLAIM IS NOT PREEMPTED, THE CASE SHOULD BE REMANDED FOR CONSIDERATION OF THE MERITS OF THE MOTION TO STRIKE.	47
V. CONCLUSION	49

## **TABLE OF AUTHORITIES**

	<b>Page(s)</b>
 <b>Cases</b>	
<i>A&amp;E Food Co. 1, Inc.</i> , 339 NLRB 860 (2003) .....	45
<i>Acme Bus Corp.</i> , 357 NLRB No. 82, slip op. (Aug. 26, 2011).....	46
<i>Airport 2000 Concessions, LLC</i> , 346 NLRB 958 (2006) .....	45, 46
<i>Arnold v. Melani</i> , 75 Wn.2d 143, 449 P.2d 800 (1968).....	44
<i>Aronson v. Dog Eat Dog Films, Inc.</i> , 738 F. Supp. 2d 1104 (W.D. Wash. 2010).....	47
<i>Bartenders Local 2</i> , 240 NLRB 757 (1979) .....	23
<i>Belknap v. Hale</i> , 463 U.S. 491 (1983).....	10, 11, 42
<i>Bristol Farms, Inc.</i> , 311 NLRB 437 (1993) .....	45
<i>Carpenter v. Elway</i> , 97 Wn. App. 977, 988 P.2d 1009 (1999) .....	47
<i>Colorado v. Spring</i> , 479 U.S. at 680 (1987).....	14
<i>Constr. Workers v. Laburnum Constr. Corp.</i> , 347 U.S. 656 (1954).....	31, 33, 34
<i>Copper River of Boiling Springs, LLC</i> , 360 NLRB No. 60, slip op. (Feb. 28, 2014).....	46

<i>Cranshaw Construction v. Int’l Ass. Of Bridge, Structural and Ornamental Ironworkers, Local 7,</i> 891 F. Supp. 666 (D. Mass. 1995) .....	43
<i>Cross Country Inn v. South Cent. Dist. Counc. United Bhd. Carpenters &amp; Joiners of Am.,</i> 552 N.E.2d 232 (Oh. App. 1989) .....	43
<i>Davis Supermarkets v. NLRB,</i> 2 F.3d 1162 (D.C. Cir. 1993) .....	43
<i>Detroit Typo. Union v. Det. Newspaper Ag.,</i> 283 F.3d 779 (6th Cir. 2002) .....	23
<i>District 65, RWDSU,</i> 157 NLRB 615 (1966) .....	18, 22
<i>Embarq Corp.,</i> 358 NLRB No. 134, slip op. (Sept. 14, 2012) .....	46
<i>Equitable Life Insurance of the U.S.,</i> 343 NLRB 438 (2004) .....	46
<i>Fashion Valley Mall, LLC v. NLRB,</i> 524 F.3d 1378 (D.C. Cir. 2008) .....	45
<i>In re Estate of Lint,</i> 135 Wn.2d 518, 957 P.2d 755 (1998) .....	35
<i>Farmer v. Carpenters,</i> 430 U.S. 290 (1977) .....	31, 33, 34
<i>George Mee Memorial Hospital,</i> 348 NLRB 327 (2006) .....	45
<i>Guimont v. Clarke,</i> 121 Wn.2d 586, 854 P.2D 1 (1993) .....	44
<i>In re Hacienda Hotel, Inc.,</i> 355 NLRB 950 (2010) .....	46
<i>Harco Asphalt Paving, Inc.,</i> 353 NLRB 661 (2008) .....	45

<i>Hearn Constr.</i> , 354 NLRB 289 (2009) .....	45
<i>Hillhaven Oakland Nursing and Rehab. Ctr. v. Health Care Workers Local 250</i> , 41 Cal. App. 4th 846, 859-62 (1996) .....	<i>passim</i>
<i>K-T Marine, Inc. v. Dockbuilders Local Union 1456 of New York and New Jersey</i> , 597 A.2d 540 (N.J. Sup. Ct. 1991).....	41, 42
<i>Laborers' International Union of North America, Local 872, AFL-CIO</i> , 359 NLRB No. 117, slip op. (May 03, 2013) .....	46
<i>Linn v. Plant Guard Workers</i> , 383 U.S. 53 (1966).....	31
<i>Local 926, Int'l Union of Op. Eng. v. Jones</i> , 460 U.S. 669 (1983).....	<i>passim</i>
<i>In re Macerich Management Co.</i> , 345 NLRB 514 (2005) .....	45
<i>Mr. Z's Food Mart</i> , 325 NLRB at 882, (4th Cir. 2001) .....	45
<i>Nicks'</i> , 326 NLRB 997 (1998) .....	45
<i>NLRB v. Calkins</i> , 197 F.3d 1080 (9th Cir. 1999) .....	45
<i>NOVA Southeastern University</i> , 357 NLRB No. 74, slip op. (Aug. 26, 2011).....	46
<i>O'Neil's Markets, Inc.</i> , 318 NLRB at 649-650 (1995).....	45
<i>Palm Beach Co. v. Journeymen's and Production Allied Services of Am and Canada Int'l Local 157</i> , 519 F. Supp. 705 (D. N.Y. 1981).....	42

<i>Parker v. Connors Steel Co.</i> , 855 F.2d 1510 (11th Cir. 1988) .....	7, 28, 29
<i>PayLess Drug Stores</i> , 311 NLRB 678 (1993) .....	45
<i>Penn. Nurses Ass’n v. Penn. State Educ. Ass’n</i> , 90 F.3d 797 (3d Cir. 1996).....	14, 42
<i>Proctor v. Huntington</i> , 196 Wn.2d 491, 238 P.3d 1117 (2010) .....	44
<i>Quinn v. Cherry Lane Auto Plaza, Inc.</i> , 153 Wn. App. 710, 225 P.3d 266 (2009) .....	49
<i>Riesbeck Food Markets v. UFCW Local 23</i> , 404 S.E.2d 404 (W. Va. 1991).....	43
<i>Roundy’s, Inc.</i> , 356 NLRB No. 27, slip op. (Nov. 12, 2010).....	41, 43, 46
<i>Roundy’s Inc. v. NLRB</i> , 674 F.3d 638 (7th Cir. 2012) .....	44
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236 (1959).....	<i>passim</i>
<i>San Jose v. Op. Engs. Local 3</i> , 49 Cal. 4th 597 (2010) .....	41
<i>Sears v. San Diego County Dist. Council of Carpenters</i> , 436 U.S. 180 (1978).....	<i>passim</i>
<i>Shirley v. Retail Store Employees Union</i> , 592 P.2d 433 (Kan. 1979) .....	43
<i>Snyder’s of Hanover, Inc.</i> , 334 NLRB 183 (2001) .....	45
<i>Spratt v. Toft</i> , 2014 WL 1593133 (Wn. Ap. April 21, 2014).....	48, 49

<i>T&amp;H Bonds Inc. v. Local 199 Laborers Int’l Union</i> , 579 F. Supp. 2d 578 (D. Del. 2008).....	28
<i>Taggart v. Weinacker’s, Inc.</i> , 397 U.S. 223, 227 (1970).....	43, 44
<i>UAW v. Russell</i> , 356 U.S. 634 (1958).....	31, 32
<i>UCSF Stanford Health Care</i> , 335 NLRB 488 (2001) .....	45
<i>Volentine v. Bechtel, Inc.</i> , 27 F. Supp. 2d 728 (E.D. Tex. 1998).....	8, 28, 29
<i>Wal-Mart Stores, Inc. v. United Food and Commercial Workers International Union, Organization United for Respect At Wal-Mart</i> , Case No. CV-2013-0709-4 .....	4, 8
<i>Waremart</i> , 337 NLRB 289 (2001) .....	45
<i>Wiggins &amp; Co. v. Retail Clerks Union L. 1557</i> , 595 S.W.2d 802 (Tenn. 1980).....	43
<i>Wild Oats</i> , 336 NLRB at 180 (2001) .....	45
<i>Youngdahl v. Rainfair, Inc.</i> , 355 U.S. 131 (1957).....	31, 32
<b>Statutes</b>	
29 U.S.C. § 151 .....	<i>passim</i>
29 U.S.C. §158(b)(1)(A).....	10, 16, 18, 19
29 U.S.C. §158(b)(7)(C) .....	10
29 U.S.C. § 160(a) .....	3, 22
29 U.S.C. §160(j) .....	9, 23

RCW 4.24.525(2).....48

RCW 4.24.525(4)(a) .....48

RCW 4.24.525(4)(b) .....48

RCW 4.25.525 .....48

## **I. INTRODUCTION**

In this case, Walmart appeals from the order of the Superior Court dismissing its lawsuit alleging that Appellees United Food and Commercial Workers International Union and the Organization United for Respect at Walmart or OUR Walmart trespassed when they conducted events inside Walmart stores and on adjacent sidewalks and parking lots. The Superior Court dismissed the lawsuit because “the claims presented by the lawsuit ... are preempted by the National Labor Relations Act and the Supremacy Clause of the United States Constitution.” 29 U.S.C. § 151 (“NLRA”). The NLRA is the federal law that protects workers’ rights to act together or in concert to improve working conditions, to choose to be represented by labor unions, and that requires companies to bargain with representatives of their workers.

The UFCW is a labor union assisting Walmart workers or Associates improve their working conditions. OUR Walmart is an association of Walmart Associates. The object of the events is to persuade Walmart first to improve working conditions and, second, to reinstate Associates Walmart terminated for speaking out for better working conditions and to stop retaliating against other Associates who speak out.

The allegations Walmart made in its complaint and the evidence Walmart submitted to the Superior Court demonstrate that the Appellees

conducted the events peacefully and in an orderly and unobstructive manner. Moreover, no law enforcement agency has charged anyone who participated in any event at a Walmart store with a violent crime, criminal trespass or any other crime. Specifically, Appellees submit Walmart has neither credibly alleged nor offered evidence that any of the events involved violence, threats of violence, damaged property or blocked the access of customers, Associates or managers to stores or to any areas within stores. Appellees also submit that no participant refused to leave after being ordered to, as evidenced by the fact that no police officer has arrested or charged any participant with trespass.

The Superior Court correctly held that the NLRA preempts Walmart's lawsuit. In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, the U.S. Supreme Court held that when a lawsuit concerns conduct that the NLRA arguably prohibits, the NLRA preempts the lawsuit. 436 U.S. 180, 187-88 (1978), citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

Before it filed its lawsuit, Walmart filed an unfair labor practice charge with the National Labor Relations Board alleging that the NLRA prohibited Appellees' events because those events allegedly "trespassed" or involved participants who "invaded" or "entered" Walmart property and refused to leave when asked. More specifically, Walmart argued that

“the UFCW ... and ... ‘OURWalmart’ violated [the NLRA] by planning, orchestrating, and conducting a series of unauthorized and blatantly trespassory in-store mass demonstrations, invasive ‘flash mobs,’ and other confrontational group activities at numerous facilities nationwide.” CP 128, 237-243, 253. In its Labor Board charge, Walmart invoked the Labor Board’s jurisdiction under § 10(a) of the NLRA seeking an order prohibiting Appellees from holding any events inside Walmart stores or on adjacent parking lots nationwide. 29 U.S.C. § 160(a).<sup>1</sup> This is the same remedy Walmart sought in this lawsuit. CP 61-62.

The Labor Board investigated Walmart’s charge over several months, interviewing Walmart’s witnesses and numerous Appellee witnesses, requesting, receiving and reviewing hundreds of Appellee documents, and soliciting Appellees’ legal position on Walmart’s charge.

Before the Labor Board completed its investigation, Walmart amended its charge to rescind its allegations of Appellees’ trespass and property invasions from the Labor Board and instead filed these allegations in Pierce County about three months after it filed the charge with the Labor Board. CP 1384-1385; 1-14. In a virtually identical trespass lawsuit Walmart filed against the same parties in Arkansas circuit

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<sup>1</sup> “The Board is empowered ... to prevent any person from engaging in any unfair labor practice.”

court, Walmart’s counsel explained to the circuit court that Walmart “withdrew all [Labor Board] charges with respect to these in-store invasion or property intrusions precisely because it chose [state courts] and state court actions for trespass rather than the NLRB process.” *Wal-Mart Stores, Inc. v. United Food and Commercial Workers International Union, Organization United for Respect At Wal-Mart*, Case No. CV-2013-0709-4, VRP (6/3/13) at 708:5-9. *See* Appendix.

By filing and arguing its Labor Board charge the way it did, Walmart effectively conceded that the NLRA arguably prohibits the events at issue in its lawsuit and that in turn the NLRA preempts the lawsuit. For these reasons, the Superior Court correctly held that the NLRA preempts Walmart’s lawsuit and that this labor dispute should remain with the forum Walmart first chose to raise it in – the Labor Board – and from whom Walmart sought the very same remedy it sought in this lawsuit.<sup>2</sup>

## II. STATEMENT OF THE CASE

After it filed an unfair labor practice charge with the Labor Board on March 1, 2013, arguing that the National Labor Relations Act, 29 U.S.C. §151, prohibited the events Appellees held at its stores, Walmart

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<sup>2</sup> Walmart emphasizes the other state trial courts that have ruled that the NLRA does not preempt its trespass lawsuits. Appellees encourage this Court to closely read all of those decisions. Appellees respectfully submit that none analyze the issues as thoroughly or as thoughtfully as did the Superior Court here.

filed a suit in Pierce County Superior Court on April 18, 2013, alleging trespass. CP 1-14; 240-243. In August 2013, Appellees filed a special motion to strike the amended complaint. On September 13, 2013, Judge Jack Nevin dismissed the suit, holding that Walmart's claims were preempted by the National Labor Relations Act and the Supremacy Clause of the United States Constitution. CP 1404-1409. Walmart appealed.

### **III. ARGUMENT**

#### **A. IN THE CONTEXT OF THIS CASE, THE NATIONAL LABOR RELATIONS ACT AND THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION PREEMPT WALMART'S LAWSUIT.**

##### **1. Here, Walmart implicitly recognized the Labor Board's jurisdiction.**

The Superior Court correctly held that the NLRA preempted Walmart's trespass lawsuit first, because by "initially pursuing relief with the National Labor Relations Board, [Walmart] implicitly recognized the board's jurisdiction over [its] claims," and second, because the "activities [described in the Labor Board charge] ... are substantially identical to those in the complaints filed in this matter" because the complaint in several paragraphs "talk[ed] about [and] alleg[ed] issues that [were] substantially the same as th[ose] in the ULP." VRP (9/13/13) at 13:10-17, 12:3-8.

When "an activity is arguably subject to [the NLRA], the States ...

must defer to the exclusive competence of the National Labor Relations Board.” *Sears v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 187-88 (1978). State “jurisdiction must yield” when it “may fairly be assumed that the activities which a State purports to regulate are protected by ... the National Labor Relations Act or constitute an unfair labor practice under” the NLRA. *Sears*, 436 U.S. at 187, *quoting San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

The Supreme Court in *Garmon* explained that the NLRA preempts such state court lawsuits because “Congress has entrusted the administration of the labor policy for the Nation ... to a centralized administrative agency ... armed with its own procedures, and equipped with its specialized knowledge and cumulative experience.” 359 U.S. at 242. The *Garmon* Court explained that:

Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order.

359 U.S. at 242-43. Any other rule would involve “too great a danger of conflict between power asserted by Congress and requirements imposed by state law.” 359 U.S. at 244. This preemption rule is based on the U.S.

Constitution's mandate that the "Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const., Art. VI, cl. 2.

Courts have held that this NLRA preemption rule "has the greatest validity when a party has sought redress for [the party's] claims from the NLRB and in the face of an adverse decision the claims are restructured as state law claims and pursued in state court." *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1517 (11th Cir. 1988). This is because when a party files a Labor Board charge arguing that the NLRA prohibits the activities that are the subject of a lawsuit, the party concedes that the NLRA arguably prohibits those activities and therefore preempts its lawsuit. *Parker*, 855 F.2d at 1517.

In *Parker*, workers filed a Labor Board charge against their company for bargaining in bad faith after the company closed their plant even after their union agreed to concessions. 855 F.2d at 1514-15. After the Labor Board dismissed the charge, the workers sued the company for fraudulently misrepresenting that it would keep the plant open if the workers agreed to concessions. *Parker*, 855 F.2d at 1515.

The *Parker* court held that by "initially pursuing relief with the NLRB the employees have implicitly recognized the Board's jurisdiction over their claims" and held that the NLRA preempted them. 855 F.2d at

1517; *see also* *Volentine v. Bechtel, Inc.*, 27 F. Supp. 2d 728, 734 (E.D. Tex. 1998) (same), *aff'd*, 209 F.3d 719 (5th Cir. 2000) (unpublished).

In the trespass lawsuit Walmart filed against the same parties in Arkansas circuit court, Walmart's counsel explained that Walmart "withdrew all [Labor Board] charges with respect to these in-store invasion or property intrusions precisely because it chose [state courts] and state court actions for trespass rather than the NLRB process." *Wal-Mart Stores, Inc. v. United Food and Commercial Workers International Union, Organization United for Respect At Wal-Mart*, Case No. CV-2013-0709-4, VRP (6/3/13) at 708:5-9. See Appendix. Thus, Walmart has not only implicitly recognized the NLRA prohibits trespass, it openly acknowledged that it changed its mind about the forum in which to seek a remedy for the alleged trespass.

Consistent with this common sense principle, the Superior Court held that by "initially pursuing relief with the National Labor Relations Board, [Walmart] implicitly recognized the board's jurisdiction over [its] claims." VRP (9/13/13) at 13:14-17.

- 2. The NLRA preempts Walmart's lawsuit because the NLRA "arguably prohibits" the events at issue in Walmart's lawsuit.**
  - a. Where, as here, the focus of the Labor Board charge and the state lawsuit are substantially identical, the state suit is preempted.**

The U.S. Supreme Court in *Sears* discussed the factors necessary to prove arguably prohibited preemption. 436 U.S. at 206. *Sears* involved a union that picketed a company on its property. 436 U.S. at 182. After the union refused the company's demand to leave, the company filed a state court lawsuit alleging that the union committed trespass by simply being on the property, regardless of its conduct. 436 U.S. at 182-83.

The Court in *Sears* held that the NLRA did not preempt the state court lawsuit for two reasons. First, the Court explained that holding that the NLRA preempted the state court lawsuit would result in “denying the employer access to any forum in which to litigate either the trespass issue or the [NLRA] issue.” 436 U.S. at 206. In *Sears*, preemption would have denied the company a forum because the union had not filed a Labor Board charge. Here, Walmart filed a charge with the Labor Board. Therefore, in contrast to *Sears*, Walmart was not denied a forum when the Superior Court held that the NLRA preempted Walmart's lawsuit.<sup>3</sup>

Second, the *Sears* Court determined that the matter that the NLRA

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<sup>3</sup> The Court should reject Walmart's assertion (Opening Brief at 1) that if the Court affirms the Superior Court's decision, Walmart will be without any remedy other than self-help. If Appellees continue to hold events at its stores, Walmart can always refile its Labor Board charge and request that the NLRB order Appellees not to hold any events inside Walmart stores or on adjacent parking lots and sidewalks, as Walmart originally requested. Walmart can also ask the Labor Board to ask a federal district court to preliminarily enjoin Appellees for holding events at the outset of the Labor Board proceeding. 29 U.S.C. §160(j) (“The Board shall have the power, upon issuance of a complaint ... to petition [a] United States district court ... for appropriate temporary relief or restraining order”).

arguably prohibited was not “identical” to the matter at issue in the state court lawsuit. The *Sears* Court concluded that the company’s simple trespass lawsuit and the “Board controversies could not fairly be called identical” for purposes of preemption because the state “action concerned only the location of the picketing while the arguable unfair labor practice would focus on the object of the picketing.”<sup>4</sup> *Belknap v. Hale*, 463 U.S. 491, 510 (1983) (summarizing *Sears* and emphasis added). Thus, the potential conduct the NLRA arguably prohibited in *Sears* focused only on the purpose of the union’s activities. 436 U.S. at 185. In contrast, the company’s trespass lawsuit “sought simply to remove the pickets from [the company’s] property” arguing that “as a matter of state law, the location of the picketing was illegal but the picketing itself was unobjectionable.” 463 U.S. at 510 (emphasis added). Thus, the company in *Sears* never “asserted [any] claim that the picketing itself violated” the NLRA, as Walmart asserted in its Labor Board charge here. *Sears*, 436 U.S. at 185.

Based on this distinction, the *Sears* Court held that the NLRA did not preempt the company’s lawsuit there because the “controversy” before

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<sup>4</sup> The section of the NLRA involved in *Sears* was §8(b)(7)(C) which concerns only the object or purpose of the union’s activities. 29 U.S.C. §158(b)(7)(C). In contrast, here, Walmart’s Labor Board charge alleged that the Appellees’ activities violated §8(b)(1)(A), which concerns how and where the union conducted its activities. 29 U.S.C. §158(b)(1)(A). CP 237-243.

the Labor Board “could not fairly be called identical” because the trespass “action concerned only the location of the picketing while the arguable unfair labor practice would focus on the object” of the union’s activities. *Belknap*, 463 U.S. at 510 (summarizing *Sears*).

Thus, this case is unlike *Sears* because Walmart’s allegations are fundamentally different than those the company in *Sears* made. As discussed below, in its lawsuit, Walmart – unlike the company in *Sears* – very much objected to the activities Appellees conducted and the manner in which Appellees conducted them. And, unlike the company in *Sears*, Walmart filed a Labor Board charge alleging that the NLRA prohibited Appellees’ activities and the manner in which Appellees conducted them.

Courts do not apply “identical” literally when determining whether a Labor Board charge and state court lawsuit have identical matters in common. Rather, courts examine whether at least one matter in the Labor Board charge is substantially identical to a matter in the lawsuit. *See, e.g., Local 926, Int’l Union of Op. Eng. v. Jones*, 460 U.S. 669, 672-73 (1983).

In *Local 926*, the U.S. Supreme Court held that the NLRA preempted a lawsuit because it shared substantially identical matters with the plaintiff’s Labor Board charge since the plaintiff used the same language in the Labor Board charge and lawsuit complaint. Because of this, the NLRA preempted the lawsuit, even though the focus of the charge

and lawsuit were different, the claims involved different rights of different parties, and even though the plaintiff later attempted to disavow the language the plaintiff used in his Labor Board charge. The focus of the Labor Board charge was the company's right to select its bargaining agent whereas the focus of lawsuit was the worker's right to his employment contract.

The plaintiff in *Local 926* filed a Labor Board charge arguing that a union interfered with his company's NLRA right to freely select the company's representative for bargaining with the union. The plaintiff stated in the Labor Board charge that the union caused the company to terminate the plaintiff and that the plaintiff had bargaining responsibilities for the company. After the Labor Board dismissed the charge, the plaintiff filed a lawsuit against the union alleging tortious interference with the plaintiff's employment contract with the company. *Local 926*, 460 U.S. at 671-72.

In determining that the charge and lawsuit were substantially identical, the Court relied on the similarity of the language the plaintiff used in the charge and lawsuit. In the Labor Board charge, the plaintiff stated that the union "coerced [the Company] in the selection of its supervisors and bargaining representative.'" *Local 926*, 460 U.S. at 674, 679-80, 677. In the lawsuit complaint, the plaintiff likewise stated that the

union “intimidated and coerced [the company], into breaching its employment contract.” 460 U.S. at 674 (emphasis added). Based on the plaintiff’s statements, the Court held that the NLRA preempted the lawsuit even though the charge and lawsuit had different elements, and even though they sought to protect different rights of different parties.

The Court rejected the plaintiff’s argument that the NLRA did not preempt the lawsuit because “the state cause of action and the unfair labor practice charge [were] not sufficiently alike” because unlike with the Labor Board charge, the plaintiff did not have to prove coercion to make out a claim of tortious interference with contract. *Local 926*, 460 U.S. at 681-82. Relying on the language the plaintiff used in his complaint, the Court found that the plaintiff “sought to prove a coerced discharge and breach of contract” and that this was similar enough to show that his lawsuit and charge shared a common matter. *Local 926*, 460 U.S. at 682. Thus, the Court held that the NLRA preempted the lawsuit even though the Labor Board charge focused on protecting the company’s right to choose its bargaining representative and the lawsuit focused on the plaintiff’s right to contract.<sup>5</sup>

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<sup>5</sup> For the same reasons, this Court should reject Walmart’s attempt (Opening Brief at 18-19) to recharacterize its lawsuit legal theory and now argue that the way the Appellees conducted their events is irrelevant to Walmart’s trespass argument. The fact is that Walmart’s Complaint reveals that Walmart alleged that Appellees trespassed because of the manner they conducted their events. CP 47-62. It is too late for Walmart to now

The Court also rejected the plaintiff's argument that the NLRA should not preempt the lawsuit because the Labor Board charge was meritless, since the plaintiff in fact did not have bargaining responsibilities. Again relying on the language of the plaintiff's Labor Board charge, the Court held that the plaintiff could not in the lawsuit disavow his statement in the Labor Board charge that the plaintiff "would have collective bargaining responsibilities" if the plaintiff continued to work at the company. *Local 926*, 460 U.S. at 679-80. Whether the plaintiff in fact had such responsibilities did not determine whether the NLRA arguably prohibited the matters at issue. 479 U.S. at 680.

Thus, determining whether the NLRA preempts a lawsuit requires an analysis of the allegations the party made because a Labor Board "proceeding and a state-law cause of action will, by definition, deal with different claims and if their lack of identity were conclusive, the state claims would never be preempted." *Penn. Nurses Ass'n v. Penn. State Educ. Ass'n*, 90 F.3d 797, 805 (3d Cir. 1996) (holding NLRA preempted state lawsuit).

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change its legal theory, just as the *Local 926* Court prohibited the plaintiff there from changing his.

Similarly, it is too late for Walmart to change (Opening Brief at 21) the legal theory it advanced in support of its Labor Board charge. Walmart did more than place the alleged NLRA violation in the context of trespass. In its charge, cover letter and Summary of Events it filed with its Labor Board charge, Walmart argued that Appellees violated the NLRA because they allegedly trespassed. And the cases Walmart relied on were decided largely on the unions' alleged trespass onto employer premises. CP 237-243.

- b. The Superior Court correctly held that the NLRA preempts Walmart's lawsuit because Walmart's Labor Board charge and lawsuit share substantially identical matters.**

The Superior Court correctly found the “activities” Walmart argued the NLRA prohibited “are substantially identical to those in the complaint filed in this matter” because the complaint in several paragraphs “talk[ed] about [and] alleg[ed] issues that [were] substantially the same as th[ose] in the ULP.” VRP (9/13/13) at 12. Walmart’s Labor Board charge and lawsuit are substantially identical within the meaning of *Sears* because they share four substantially identical matters: same legal theory, same remedy, same facts and same evidence. In determining substantially identical matters, the Superior Court correctly relied on the statements Walmart made in its Labor Board charge and lawsuit complaint, as the Supreme Court did in *Local 926*.

In a case with virtually the same facts and legal issues as those here, *Hillhaven Oakland Nursing and Rehab. Ctr. v. Health Care Workers Local 250*, the court held that the NLRA preempted a trespass lawsuit that the employer filed based on union representatives entering its facility without permission and who refused to leave when asked because the lawsuit was similar enough to a Labor Board charge the employer filed over the same conduct alleging a violation of the same section of the

NLRA Walmart alleged here. 41 Cal. App. 4th 846, 859-62 (1996).

*Hillhaven* involved 25 or 30 union representatives who entered a nursing home and distributed flyers to workers, residents and the families of residents, while being “noisy” and “disruptive,” and “refus[ing] to leave the building until they were ordered out by police.” *Hillhaven*, 41 Cal. App. 4th at 850-51.

In response to the entry of the union representatives, the nursing home filed both a Labor Board charge and a trespass lawsuit seeking an injunction. 41 Cal. App. 4<sup>th</sup> at 852. The Labor Board’s General Counsel agreed with the nursing home that the union violated §8(b)(1)(A) of the NLRA because union representatives “invaded” the nursing home’s “facility without permission and roamed the facility leafleting and talking to employees and residents until dispersed by the police, notwithstanding the facility administrator’s repeated demands that they leave.” *Hillhaven*, 41 Cal. App. 4th at 852.

Holding that the NLRA preempted the trespass lawsuit because the issues were sufficiently similar, the state appeals court observed that “although the issues presented to the Board and the superior court [were] not ‘identical’ . . . neither [were] they ‘completely unrelated.’” *Hillhaven*, 41 Cal. App. 4th at 859-60. Although the trial court would have jurisdiction to “intervene in the event that conduct involving actual

violence, serious threats of violence, or obstruction of access, should occur in the future,” the court held that “the state tort action created a realistic risk of interference with the Board’s primary jurisdiction,” and “for this reason” concluded that the NLRA preempted the nursing home’s trespass action. 41 Cal. App. 4<sup>th</sup> at 861-62.

For the same reasons, the Superior Court correctly held that there were matters sufficiently common to Walmart’s Labor Board charge and lawsuit so that the NLRA preempted the lawsuit.<sup>6</sup> CP 1404-1409.

**i. The legal theory of Walmart’s Labor Board charge is the same as its lawsuit theory:** Walmart’s Labor Board charge and lawsuit share the same legal theory because Walmart states in its charge that Appellees violated the NLRA because they “trespassed” and based on how they conducted their events at Walmart stores. CP 240-243. In its trespass lawsuit, Walmart alleges that Appellees trespass in part because of how Appellees conducted those same events. CP 47-62.

Walmart argued to the Labor Board that Appellees’ trespassory conduct violated the NLRA, stating that “the UFCW ... and ... ‘OURWalmart’ violated ... the [NLRA] by planning, orchestrating, and

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<sup>6</sup> None of the decisions of the other courts in Walmart’s trespass cases found that Walmart’s trespass lawsuits and Labor Board charge did not have substantially identical matters in common. Rather, each one of those decisions is based on a finding that the deeply rooted local exception to the *Sears* preemption rule applies to trespass lawsuits. The inapplicability of this exception is discussed below.

conducting a series of unauthorized and blatantly trespassory in-store mass demonstrations, invasive ‘flash mobs,’ and other confrontational group activities at numerous facilities nationwide.” CP 243 (emphasis added).

To support its argument that the NLRA prohibits Appellees’ alleged trespass, Walmart referred the Labor Board to its “on-point decision . . . establish[ing] that . . . store invasions violate[ NLRA] §8(b)(1)(A)”: *District 65, RWDSU*, 157 NLRB 615, 616 (1966), *enf’d*, 375 F.2d 745 (2<sup>nd</sup> Cir. 1967). In *District 65*, the Labor Board held that §8(b)(1)(A) of the NLRA prohibited union representatives from “enter[ing] the premises of” various companies, “without permission, . . . refusing to leave when requested by the employers,” the very definition of trespass. 157 NLRB at 616. CP 243.

As discussed in more detail above, the NLRB charged a union with violating the same section of the NLRA that Walmart alleged Appellees violated on facts similar to those here and in *District 65*. *Hillhaven*, 41 Cal. App. 4th at 850-51. The Labor Board’s General Counsel agreed with the nursing home that the union violated §8(b)(1)(A) of the NLRA because union representatives “invaded” the nursing home’s “facility without permission and roamed the facility leafleting and talking to employees and residents until dispersed by the police, notwithstanding the facility administrator’s repeated demands that they leave.” *Id.* at 852.

Thus, the NLRB has charged other unions with violating the same section of the NLRA Walmart argued Appellees violated – § 8(b)(1)(A) – based on the same allegations Walmart made in its Labor Board charge against Appellees, i.e., that Appellees “invaded” its stores “without permission,” “leafleted” and “talked” to “workers” and “customers” and refused “repeated demands” that Appellees “leave the premises.” CP 242-243, 240, 241.

**ii. The theory of Walmart’s trespass lawsuit is the same:** Walmart’s lawsuit allegations reveal that, just like its Labor Board charge, the Appellees’ conduct and messages are central to Walmart’s trespass theory. Thus, Walmart did not simply plead its complaint as the company in *Sears* did, that only “the location of the picketing was illegal but the picketing itself was unobjectionable.” 436 U.S. at 185 (emphasis added). Rather, Walmart argues that Appellees trespassed because of the message and manner in which they conducted events at its stores. And, the message and manner Appellees conducted the events is what makes the location of the events objectionable to Walmart.

In its lawsuit, Walmart alleges that Appellees’ activities trespassed because of the nature of those activities and how they were conducted. For example, Complaint ¶2 alleges that participants “scream[ed] through bullhorns, carr[ied] signs on sticks, [and] conduct[ed] in-store ‘flash

mobs.” Paragraph 16 alleges that the defendants “orchestrated confrontational and trespassory mass demonstrations, picketing, in-store confrontations with managers, and other disruptive conduct.” Paragraph 17 alleges that “20 OURWalmart demonstrators gathered inside the Auburn, Washington store and gave a manager a flyer and a letter addressed to Mr. Rob Walton, the Chairman of the Board of Walmart. The demonstrators then began handing out the flyers to customers at each entrance in the parking lot, sometimes running up to customers in their cars.” CP 47, 50.

In ¶18, Walmart alleges that demonstrators “hand[ed] the store manager a letter addressed to Mr. Walton” and “handed out flyers outside the main entrance to the store.” CP 51. Paragraph 20 alleges that demonstrators “presented a manager with a petition and flyers,” videotaped the activity, “stood outside the store and continued handing out flyers to entering customers,” and “chant[ed] through a bullhorn.” CP 51. Paragraph 21 alleges that a “crowd congregated outside the front entrance of the store and distributed OURWalmart pamphlets and flyers to customers.” CP 51. Paragraph 26 alleges that “demonstrators set up pickets outside the two front entrances . . . , handing out lime green balloons.” CP 53.

Paragraph 32 alleges that demonstrators wore “lime green

OURWalmart t-shirts,” “lined up between the cash registers and the restrooms and chanted, ‘We demand respect,’” and “took a group picture at the front entrance.” CP 55. Paragraph 33 alleges that participants distributed “OURWalmart pamphlets.” CP 55. Lastly, in ¶44, Walmart alleges that defendants engaged in “picketing, patrolling, parading, ‘flash mobs,’ demonstrations, handbilling, solicitation, customer disruptions, and manager confrontations.” CP 57.

Analyzing the same complaint allegations, the Superior Court found that “the matters alleged” in Walmart’s complaint were “substantially identical” to those Walmart alleged in its Labor Board charge, that is, that Appellees “plann[ed], orchestrat[ed], and conduct[ed] a series of unauthorized and blatantly trespass[es] in [Walmart stores].” VRP (9/16/13) at 12:8-10.

Thus, unlike the company in *Sears* who in its lawsuit objected solely to the location of the union's activities and did not object to the activities themselves, Walmart in its lawsuit objects to the activities Appellees conducted, their messages, and the manner in which Appellees conducted them.<sup>7</sup>

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<sup>7</sup> As the U.S. Supreme Court did in *Local 926*, this Court should reject the argument that Walmart makes here: its legal theory and arguments in its Labor Board charge and lawsuit are different because the NLRA violation concerns worker rights while trespass law concerns company property rights. 460 U.S. at 672-73. Rather than determining preemption based on the rights protected by the NLRA and state law, the *Jones* Court

**iii. The remedy for Walmart’s Labor Board charge is the same as the remedy Walmart sought in its lawsuit:** In its lawsuit, Walmart sought the same remedy that the Labor Board would have provided for Walmart’s Labor Board charge: an order preventing the Appellees from trespassing inside Walmart stores or on adjacent parking lots and sidewalks. In the case Walmart argued to the Labor Board in support of its charge, the Labor Board ordered that the union “cease and desist entering the premises of any of the [companies] in this case.” *District 65*, 157 NLRB at 617.

The Labor Board possesses far-reaching remedial powers that it could use to prevent Appellees’ alleged trespass. In § 10(a) of the NLRA, Congress “empowered” the Labor Board with authority “to prevent any person from engaging in any unfair labor practice.” 29 U.S.C. § 160(a). Moreover, the Labor Board’s broad remedial “power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.”<sup>8</sup> 29 U.S.C. § 160(a).

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analyzed what the plaintiff actually alleged to the Labor Board and state court. 460 U.S. at 672-73. The Court concluded that because the plaintiff stated the same allegations to the Labor Board and state court, the Labor Board charge and lawsuit shared substantially identical matters, even though the NLRA and state law violations protected different rights and different parties, and that therefore the NLRA preempted the lawsuit.

<sup>8</sup> Thus, the NLRA and Labor Board cases reveal that the Labor Board and courts could have ordered and enjoined Appellees from entering its stores and adjacent common areas to hold events, as Walmart requested the Labor Board to do. Clearly, the Labor Board

Such an order would have applied to all Walmart property nationwide. In fact, nothing prevents Walmart from filing a new Labor Board charge seeking again to enjoin Appellees' alleged continuing trespass.<sup>9</sup>

The Labor Board has the power to provide Walmart the same practical cease and desist order from alleged trespassory conduct that Walmart seeks in this lawsuit, regardless of the NLRA's focus on protecting worker rights. For example, in *Bartenders Local 2*, the Labor Board remedied the exact same NLRA violation that Walmart alleged here, employee coercion, by enjoining the union from committing trespass when it ordered the union to "cease and desist from":

entering said [company] premises with groups of its members, representatives, or adherents, uninvited or over the protest of managerial agents of [the company], and disrupting the business operations of [the company], all in the presence of employees of [the company].<sup>10</sup>

240 NLRB 757, 762 (1979)

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has the authority to order more than Appellees cease entering stores to "bully" Associates.

<sup>9</sup> The NLRA does not require the Labor Board to ask district courts to exercise the Labor Board's power to issue cease and desist orders after finding violations of the NLRA. Rather, the NLRA states that the Labor Board has to go to district courts to seek temporary injunctions before finding NLRA violations. 29 U.S.C. §160(j) ("The Board shall have the power, upon issuance of a complaint ...to petition [a] United States district court ... for appropriate temporary relief or restraining order").

<sup>10</sup> See also *Detroit Typo. Union v. Det. Newspaper Ag.*, 283 F.3d 779, 783 (6th Cir. 2002) (enjoined "blocking or otherwise coercively interfering with ingress or egress" to company property "by any means including, but not limited to: physical confrontation or intimidation, unlawful group trespass, mass picketing").

That a Labor Board cease and desist order might enjoin activity occurring “in the presence of employees” would not deprive Walmart of any remedy that it seeks. All of the Appellees’ alleged conduct that Walmart alleges constitutes trespass here and seeks to enjoin occurs in the presence of Walmart employees.

**iv. Walmart relies on the same allegations, facts and evidence in its lawsuit and Labor Board charge:** The matters in Walmart’s lawsuit and Labor Board charge are also substantially identical because the facts and evidence Walmart relied on in its lawsuit are the same as those it relied on in its Labor Board charge.

In support of its charge, Walmart submitted a Summary of Events at Walmart Stores. CP 1360-1382. The description of almost every event in Walmart’s Summary describes how participants entered or “invaded” the store and did not immediately leave when asked or directed. Several allege that “trespass” violated the NLRA. *See* Event Nos. 48-51 at CP 1375-1376. For example, Complaint ¶19 alleges that a “group of 20-25 demonstrators ... gathered outside the front entrance with signs and began handbilling” at the Renton store on October 10, 2012. CP 51. Event No. 48 of the Summary of Events Walmart submitted to the Labor Board describes approximately “20-25 demonstrators [who] congregated outside the [Renton] store, passing out OURWalmart fliers” on October 10. CP

1375.

Complaint ¶23 alleges that on “November 3, 2012, a group of 10 or so OURWalmart demonstrators met inside the Walmart store in Auburn, formed a circle, and banged loudly on pots, pans and other cookware as they chanted. When the police arrived, the group began to leave the store, chanting, ‘Who’s Walmart, OURWalmart’ and ‘Who has the power? We do.’” CP 52. Event No. 50 of the Summary states that on November 3, 2012, at the Auburn store, a “group of 15 OURWalmart supporters invaded the store, paraded around banging pots and pans, and chanting .... The police arrived and the demonstrators started to leave the store. As they left, they chanted things such as ‘Who’s Walmart, Our Walmart’ and ‘Who has the power, We Do.’” CP 1375.

Complaint ¶24 alleges that on:

November 15, 2012, approximately 30 demonstrators gathered at the front of the Walmart store in Federal Way in King County ....The store manager explained Walmart’s no solicitation policy and asked the group to leave. The group refused to leave, and told the store manager that he had to call the police. The crowd grew to about 60-90 demonstrators ....The police arrived, and asked the group to leave Walmart’s property. The group gathered at their original location on the street and held a rally .... After the police left, the group marched back to the front of the store. The store manager instructed his managers to shut off the automatic sliding doors so that they would not open when someone approached from the outside, but would open for customers exiting the store. The demonstrators surrounded and pressed on the front doors, trying to open them for

nearly 5 minutes. Customers had difficulty leaving the store.

CP 52.

Event No. 51 of Walmart's summary states that at its Federal Way store on November 15 approximately:

60 to 90 demonstrators paraded in front of the store . . . . The store manager approached the group and informed them of Walmart's no solicitation policy and asked them to leave. They refused to leave and told the store manager to call the police. The police arrived and asked the group to leave. The group then moved off Walmart property but once the police left, the group returned to the store with the band and tried to invade the store. The group pressed against the doors attempting to enter the store and this blocked customers and associates from entering or exiting the store.

CP 1376.

Complaint ¶26 alleges that at the Renton Store on November 23 "a group of 100 to 200 UFCW and OURWalmart members trespassed and paraded on Walmart's parking lot for over two hours," and that the "crowds made it difficult for customers to enter the parking lot and find a parking space." CP 53. Event No. 49 of the Summary states that a "group of 100 to 200 demonstrators ... paraded and picketed in the parking lot and in front of the entrances .... Customers pulled into the parking lot and then drove away after seeing the large group. Members of the group were seen walking in and out of parking stalls, blocking customers from

parking. The group also blocked the flow of vehicular traffic in the parking lot.” CP 1375.

Finally, numerous declarations Walmart filed with the Superior Court state that Walmart relied on them both “before the NLRB or in a court of law,” and that the declarant “would testify to th[e]se facts before the NLRB or in a court of law.” *See* Decl. of L. Guyton-Sonko at ¶1 (CP 829); Decl. of S. Haines at ¶1 (CP 839); Decl. of R. Hill at ¶1 (CP 850); Second Decl. of S. Kennedy at ¶1 (CP 856); Decl. of S. Lanier at ¶1 (CP 1112); Decl. of R. MacDonald at ¶1 (CP 1117); Decl. of T. McReynolds at ¶1 (CP 1122); Decl. of M. Pelham at ¶1 (CP 1127); Decl. of K. Smith at ¶1 (CP 1134); Decl. of R. Wagner at ¶1 (CP 1254).

**c. The Superior Court correctly prohibited Walmart from attempting to avoid preemption by arguing that it withdrew most of its Labor Board allegations or that the Labor Board later dismissed the remaining allegations.**

The Superior Court rightly rejected Walmart’s attempt to avoid preemption based on its decision to withdraw allegations from its Labor Board charge and instead file them in court, or to change its legal theory or factual allegations for the same purpose.

In *Local 926*, the U.S. Supreme Court rejected the plaintiff’s argument that the NLRA should not preempt his lawsuit because the Labor Board dismissed his charge over the same matter “cleared the way

for a state cause of action.” 460 U.S. at 680. The Court explained that “the *Garmon* pre-emption doctrine ... protects the exclusive jurisdiction of the Board over matters arguably within the reach” of the NLRA.<sup>11</sup> *Local 926*, 460 U.S. at 680.

For the same reasons, the court in *Volentine* rejected the plaintiffs’ argument that because the “NLRB ... unequivocally stated that the conduct which the defendant [asserted was] arguably protected or prohibited by the Act [was] not,” the court could not “rule that the conduct [was] arguably protected or prohibited by the Act.” 27 F. Supp. 2d at 735. The court explained that while the Labor Board’s dismissal letter “may [have] unequivocally ... state[d] the conduct [was] neither protected nor prohibited by the NLRA, it d[id] *not* state that the conduct [was] neither *arguably* protected nor *arguably* prohibited by the NLRA.” 27 F. Supp. 2d at 735. *See also T&H Bonds Inc. v. Local 199 Laborers Int’l Union*, 579 F. Supp. 2d 578, 583, 579 (D. Del. 2008) (NLRA preempted company’s state lawsuit even though union withdrew its Labor Board charge).

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<sup>11</sup> *See also Garmon*, 359 U.S. at 245 (“the failure of the National Labor Relations Board to assume jurisdiction d[oes] not leave the States free to regulate activities they would otherwise be precluded from regulating”); *Parker*, 855 F.2d at 1517 (state fraud claims preempted even though the “two unfair labor practice charges” the plaintiffs filed “with the NLRB were later dismissed and an appeal denied by the [NLRB] General Counsel”); *Volentine*, 27 F. Supp. 2d at 735-36; *Hillhaven*, 41 Cal. App. 4<sup>th</sup> at 853 (NLRB preempted trespass lawsuit even though union settled the Labor Board case and the Labor Board dismissed the case).

This Court should also prohibit Walmart from “recast[ing] the same [NLRB] claims and factual allegations into state law” claims. *Parker*, 855 F.2d at 1517. Faced with a similar attempt to avoid preemption by recasting Labor Board charges as state court claims, the *Volentine* court stated “Plaintiffs seek a second bite at the same apple. Well, no deal. Plaintiffs are trying to recast their prior claim dismissed by the NLRB as something other than identical to the controversy currently before this Court.” 27 F. Supp. 2d at 735. Exactly the same is true here.

In fact, NLRA preemption “has the greatest validity” where, as Walmart does here, the party “sought redress for [its] claims from the NLRB and in the face of an adverse decision the claims are restructured as state law claims and pursued in state court.” *Parker*, 855 F.2d at 1517.

- d. Walmart’s trespass claim does not fit the “deeply rooted local interest” exception to NLRA preemption because the exception applies only to violent conduct or threats and not simple trespass without more.**
  - i. The “deeply rooted local interest” exception applies only to conduct involving violence, property destruction, and imminent threats of physical or mental injury.**

There is one exception to the NLRA preemption rule for matters that are deeply rooted in local feeling and responsibility. The U.S. Supreme Court has consistently interpreted this exception as applying only to conduct involving violence, destruction of property, or imminent threats

of actual physical or mental injury. The NLRA does not preempt lawsuits over such conduct because regulating threats to physical and mental well-being goes to the states' police powers. *Garmon*, 359 U.S. at 248 n. 6. Neither the Supreme Court, nor any other court, has ever held that simple trespass, without more, fits this exception to preemption.

The Superior Court held that Walmart's allegations did not "rise[] to the level of that deeply rooted local" interest because the [Appellees'] activities were not "violent," did not constitute "intentional torts" and did not "threaten violence." VRP (9/13/13) at 16:6-16; CP 1404-1409 at 1408.

When defining this exception, the *Sears* Court relied on *Garmon*, which characterized the deeply rooted exception as applying to "torts" that involve "conduct marked by violence and imminent threats to the public order." 359 U.S. at 247. The *Garmon* Court cited *Int'l Union v. Wisconsin Employment Relations Board* as "point[ing] out that the '(p)olicing of ... conduct ... ,' which consists of 'actual or threatened violence to persons or destruction of property,' is left to the states." 359 U.S. at 248 n.6 (emphasis added). The Court in *Garmon* held that the NLRA preempted a lawsuit for injunctive relief and damages "arising out of peaceful union activity." 359 U.S. at 239, 246 (emphasis added).

When listing torts that fit the deeply rooted exception, the *Sears*

Court notably did not include trespass, despite trespass being the only issue in that case. 436 U.S. at 195. Rather, the *Sears* Court, citing cases, limited the exception to:

- “violence” (*Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957) and *UAW v. Russell*, 356 U.S. 634 (1958));
- “threats of violence” (*Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954));
- malicious libel (*Linn v. Plant Guard Workers*, 383 U.S. 53 (1966); and
- intentional infliction of emotional distress (*Farmer v. Carpenters*, 430 U.S. 290 (1977)).

**Violence:** The “violence” in *Youngdahl* involved picketing during which “nails were strewn over the company’s parking lot” and “on the driveways of 12” non-striking workers. 355 U.S. at 132-33. Two “strikers deliberately drove a sharp instrument into two tires of a car owned by” the daughter of a non-striker. 355 U.S. at 134. Threats of violence included an “enormous amount of abusive language hurled by the strikers at the company employees [and] [o]ne of the pickets told the plant manager that she would ‘wipe the sidewalk’ with him.” 355 U.S. at 132-33. The union “was sufficiently concerned to ask the police to have someone regularly on duty at the entrance to the plant.” 355 U.S. at 134.

Despite this violence, the U.S. Supreme Court reversed the state’s

overbroad injunction, holding that the state court could enjoin the picketers only “from threatening violence ... , or provoking violence ... and ... from obstructing ... the free use of the streets adjacent to [the company’s] place of business, and ... free ingress and egress to and from that property.” *Youngdahl*, 355 U.S. at 139. The Court continued, however, that it was “clear” that a state “court entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing.” 355 U.S. at 139. The Court overturned the injunction “to the extent the injunction prohibit[ed] all other picketing and patrolling of [the company’s] premises and in particular prohibit[ed] peaceful picketing.” 355 U.S. at 139-40 (emphasis added).

***Threats of Violence and Property Damage:*** The violence in *UAW v. Russell* involved picketers who “by force of numbers, threats of bodily harm ... and damage to ... property, prevented a [worker] from reaching the plant gates.” 356 U.S. at 636. The U.S. Supreme Court held that the lawsuit was not preempted because the lawsuit involved “injuries caused by mass picketing and threats of violence.” *Garmon*, 359 U.S. at 248 n. 6 (summarizing *Russell*, 356 U.S. at 646). In also so doing, the *Russell* Court “continually stresse[d] the violent nature of the conduct.” 359 U.S. at 248 n. 6 (emphasis added), citing 356 U.S. at 646. The *Russell* Court “limit[ed] its decision” that the lawsuit was not preempted to the extent it involved

“the ‘kind of tortious conduct’ there involved.”

***Intimidation:*** Likewise in *Laburnum*, the U.S. Supreme Court held that the NLRA did not preempt a lawsuit because it involved threats of violence and violent intimidation “to such a degree that [the company] was compelled to abandon ... its [construction] projects in the area.” 347 U.S. at 658. The NLRA did not preempt “state tort law for violent conduct.” *Garmon*, 359 U.S. at 248 n. 6 (*summarizing Laburnum*, 347 U.S. at 658) (emphasis added).

***Mental Distress:*** In *Farmer*, the plaintiff alleged intentional infliction of mental distress after the union “subjected [him] to a campaign of personal abuse and harassment.” 430 U.S. at 292. The *Farmer* Court held that the NLRA did not preempt this mental distress claim because the state had an “interest in protecting the health and well-being of its citizens” and that the lawsuit matters were not substantially identical to the charge. 430 U.S. at 303-04.

The Court emphasized that it “was careful ... to limit the scope of [the deeply rooted] exception.” 430 U.S. at 300. It “recognized” that the exception applies to “state interest in ‘such traditionally local matters as public safety and order and the use of streets and highways,’” and “actions to redress injuries caused by violence or threats of violence.” 430 U.S. at 300. With respect to torts, the Court recognized that “the exception to the

pre-emption rule [covers] cases involving violent tortious activity” because nothing “in the federal labor statutes protects or immunizes from state action violence or threats of violence in a labor dispute.” 430 U.S. at 300 (emphasis added) (citing *Russell*, 356 U.S. at 640, and *Laburnum*, 347 U.S. at 666).

**ii. The deeply rooted exception applies to violent conduct because the NLRA does not protect violent conduct.**

The “exception to the pre-emption rule [covers] cases involving violent tortious activity” because nothing “in the federal labor statutes protects or immunizes from state action violence or threats of violence in a labor dispute.” *Farmer*, 430 U.S. at 300 (emphasis added) *citing Russell*, 356 U.S. at 640, and *Laburnum*, 347 U.S. at 666. Likewise, enforcement of “laws prohibiting violence, defamation, the intentional infliction of emotional distress or obstruction of access to property is not pre-empted by the NLRA” because “none of those violations of state law involves protected conduct.” *Sears*, 436 U.S. at 204.

In contrast, the *Sears* Court observed that some “violations of state trespass law may be actually protected by” the NLRA, “recogniz[ing] that in certain circumstances nonemployee union organizers may have a

limited right of access to an employer's premises."<sup>12</sup> 436 U.S. at 204, citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

**iii. Walmart's evidence proves that Appellees conducted events in a peaceful, non-threatening, orderly and non-disruptive manner.**

As the Superior Court held, the events here did not involve violence, threats of violence or property damage, and in turn fall far short of the violent conduct that the U.S. Supreme Court requires for the deeply rooted exception to apply. VRP (9/13/13) at 16; CP 1404-1409 at 1408.<sup>13</sup>

A review of the declarations and videos Walmart filed with the Superior Court reveals that none of the events Appellees conducted inside and outside its Washington stores — distributing flyers to Associates and customers, walking through stores or parking lots, chanting, meeting with managers, etc. — involved violence, threats, property damage, more than insignificant disruption of Walmart's operations, or more than a momentary delay in customers walking into or through stores or vehicles driving through parking lots.

Typical of the declarations is Human Resources Manager Larry

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<sup>12</sup> For the same reasons, Appellees respectfully submit that the courts in Walmart's other trespass lawsuits erred when they ruled that the NLRA did not preempt Walmart's trespass lawsuits because trespass fits within the deeply rooted exception.

<sup>13</sup> Walmart has not pointed to any specific, contrary evidence in the record undercutting the trial court's factual findings. In the absence of such, the trial court's findings of fact are treated as verities on appeal. *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998).

Anderson's. Anderson declares that on April 6, 2013, at Walmart's Lakewood store a group of protestors "gathered just beyond the Walmart property line," and came into the store in "groups of one or two protestors." CP 443, at ¶¶ 3-4. According to Anderson, a "group of eight to ten" chanted, "We are Walmart! We demand respect!" between the cash registers and the store's outer wall "for approximately five minutes." CP 444, at ¶¶ 9-10. A "number of protestors tried to get" the Store Manager to accept a petition. CP 444, at ¶ 12. The video of the event Walmart filed shows that the event was orderly, nondisruptive, and did not block any customer, Associate or manager. CP 875, 880-881.

The declarations of the few managers who conclusorily claimed that event participants "blocked" access to or within stores make clear that such blocking was momentary and that customers and Associates were able to continue to pass through the participants. For example, while Human Resource Manager Wagner claimed that an event on November 23, 2012, at the Renton store "blocked customers from entering the store," he later admitted that the customers got into the store, if with "difficulty." CP 1255, at ¶10.

While Shift Manager Charette claimed that a group who met with him to issue a mock write-up supposedly "trapped" one customer in the service area "who 'was unable to leave throughout the time the group was

there.’” CP 504-505, at ¶ 3. However, the video that he stated was a “fair, true and accurate depiction of the events” shows that the customer was walking through the group but decided to go back to the service desk to watch the manager receive discipline. CP 505, 880-881, at ¶ 5. The video shows that there was ample space between the participants for the customer to walk through if she chose. CP 875 at ¶ 3, Ex. 8A. The video also shows a calm, nondisruptive, nondisorderly issuance of a write up to a manager who was smiling. CP 875 at ¶ 3, Ex. 8A. Walmart’s surveillance tape, CP 876 at ¶ 4, Ex. 8B, shows no blocking, and that the few people who tried to get through the group, got through during the event that lasted less than three minutes.

While Shift Manager Guyton-Sonko claimed that a group of participants that entered the Renton store on October 10, 2012, and handed fliers out to associates and customers “was positioned in such a way that it was blocking the pathway,” she continued by admitting that they “moved aside a number of times so that people could walk through the area.” CP 829-830, at ¶¶ 3, 5. Similarly, in her declaration, Regional General Manager Madeleine Havener claimed on the one hand that “customers and associates could not walk through” handbillers to get to the store’s doors, but on the other that handbillers “walk[ed] alongside the customer or associate ... in order to try to get the customer/associate to take a flyer” as

they walked into the store. CP 842-843, at ¶ 9. Several declarations claim that unidentified “customers” “complained” that they “felt” “impeded,” without including any facts that would substantiate that the customers were in fact blocked from going where they wanted to go. *See, e.g.*, CP 1117, at ¶ 7.

Similarly, declarants’ claims that customers were frightened were either not serious or credible. For example, Zone Merchandise Supervisor Howard Baldwin alleged in his declaration that a “customer asked why the OURWalmart demonstrators wanted to interrupt her shopping experience.” CP 452-53, at ¶¶ 2-3 According to Baldwin, participants merely came “in the doors on one side of the store, and were marching in front of the cash registers,” “wearing green OURWalmart shirts,” “continued to sing and do some chant,” “to march past the cash registers, across the front of the store, and existed out the other door.” CP 453, at ¶ 3. The declaration contains no suggestion the event was in any way violent or threatening.

In her declaration, Shift Manager La’Tonja Guyton-Sonko claimed that she “felt intimidated” when one “of the group members got extremely close to [her]” because the participant “started speaking about being at the store ‘for the community.’” CP 830, at ¶ 6.

Regional General Manager Havener stated that in response to

“[s]ome customers [who] asked [her] and the other managers ... if it was safe to go outside,” Havener “told the customers that the people were demonstrating, but they would be fine going outside.” CP 843, at ¶ 11. Despite her advice to customers, Havener nevertheless claimed that she “was scared for [herself] and the employees and tried to keep the group calm.” CP 845, at ¶ 18.

In his declaration, Asset Protection Associate Bryce Ellingson alleges that one “elderly couple ... told [him] that they were afraid because they thought the demonstrators might have guns, and they were worried that the store was going to get shot up” at the Auburn store on November 3, 2012. CP 510, at ¶ 5. According to Ellingson, their fears were implausibly based on the facts that the “group took pots and pans off the shelves,” “proceeded from the pharmacy, down the main action alley” “in front of electronics and then turned up toward the jewelry department at the front of the store,” “banged on the pots and pans and chanted,” and then “proceeded toward the exit.” CP 509-510, at ¶¶ 2-4, 6. According to the Complaint, the group totaled 10 people. CP 52, ¶ 23.

Rather than show any violence, threats, property damage or blocking, many of Walmart’s declarations make it clear that Walmart objects more to the messages of the events, than where participants stood during the events. For example, in his declaration, Asset Protection

Associate Andrew Anglin claimed that at the Renton store on November 23, 2012, “demonstrators sang ‘carols’ about children being murdered,” and that “other demonstrators t[old] each customer who came by that Walmart supports child murder,” “[s]pecifically, ... tell[ing] customers [that] Walmart worked children in China to death, and the children then fell into a net and rolled into a furnace.”<sup>14</sup> CP 450, at ¶ 3. Likewise, Human Resourced Manager Wagner objected to the message participants used to allegedly “torment” Associates, telling Associates “that they worked for a company that paid below minimum wage and that supported other companies that physically abused their employees.” CP 1255, at ¶ 8.

In his declaration, Shift Manager Bronson Charette complained a group entered the Federal Way store on July 31, 2013, and that the “group leader ... began reading to [him] from a mock-coaching form” that “was poster-sized, about 3.5 feet tall and 2 feet wide.” CP 504-505, at ¶¶ 1, 5. The coaching accused Charette “of lying, being disrespectful, lacking integrity, cutting hours, and causing homelessness.” CP 505, 507-508. Charette stated that he “was hurt and offended that the demonstrators targeted [him] and accused [him] of not treating associates well.” CP 505-

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<sup>14</sup> Somehow other Walmart witnesses who heard the same carols didn’t hear any such offensive lyrics. *See* Decl. of R. Wagner at ¶7. CP 1255. Other declarants were present but didn’t hear any carols or chants. *See, e.g.*, First and Second Decls. of S. Kennedy (CP 855-874); Decl. of M. Pelham (CP 1129-1132).

506, at ¶ 8. Human Resources Manager Larry Anderson in his declaration complained only about participants “handing out OURWalmart ‘thank you’ cards to” Associates at Walmart’s Lakewood store during July 2013. CP 439-441, at ¶¶ 3-8).

**iv. *Sears* held that the NLRA did not preempt the trespass lawsuit not because trespass is a deeply rooted exception but because the lawsuit and NLRA violation did not share substantially identical matters.**

While some courts have in *dictum* cited *Sears* for the proposition that simple trespass fits the deeply rooted exception, the U.S. Supreme Court in *Sears* did not so hold. 436 U.S. at 204. Rather, the *Sears* Court held that the trespass lawsuit was not preempted because the matter the NLRA arguably prohibited was not identical to the matter at issue in the lawsuit and because, if the NLRA preempted the lawsuit, the company would be denied “access to any forum in which to litigate either the trespass issue or the [NLRA] issue.”<sup>15</sup> 436 U.S. at 206. The U.S. Supreme

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<sup>15</sup> The cases Walmart cited (at 28-30) that include *dictum* stating that the trespass lawsuit in *Sears* was preempted because of the deeply rooted exception do not hold otherwise. For example, Walmart’s attempt to rely on *dictum* in *San Jose v. Op. Engs. Local 3* is misplaced because *Local 3* was neither a NLRA nor a preemption case. Rather, it was a public employees case under the California public employee bargaining law. 49 Cal. 4<sup>th</sup> 597, 601, 232 P.3d 701, 703 (2010). Second, the *Local 3* court cited no judicial authority holding that trespass fits the local interest exception. Third, when describing this exception, the court correctly stated that it generally applies in cases “where it was necessary to ‘maintain[] civil order by deterring and punishing violence,’” and rejected the City’s argument because the strike did not “pose an immediate threat to civil order.” 49 Cal.4<sup>th</sup> at 608, 232 P.3d at 707.

Court confirmed its *Sears* holding in *Belknap v. Hale* when it notably did not mention the deeply rooted exception while explaining that preemption did not apply in *Sears* because the “state court and Board controversies could not fairly be called identical.”<sup>16</sup> 463 U.S. 491, 510 (1983).

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Similarly, the discussion of the *K-T Marine, Inc.*, court about trespass was *dictum*. 597 A.2d 540 (N.J. Sup. Ct. 1991). *K-T Marine* did not involve a claim of trespass. Rather the picketing there occurred on a public street and sidewalk in a residential area, and interfered with pedestrians walking over the sidewalk and blocked a vehicle attempting to back out of a driveway. 597 A.2d at 541-42. The issue involved “a constitutional right of privacy protecting the well-being of the home and the resident’s rights,” not trespass on private property. 597 A.2d at 543. Like *K-T Marine*, *Penn. Nurses Ass’n v. Penn. State Educ. Ass’n*, involved 11 claims ranging from breach of fiduciary duty, defamation and conspiracy, but not trespass. 90 F.3d 797, 800 (3d Cir. 1996). *Palm Beach Co. v. Journeymen’s and Production Allied Services of Am and Canada Int’l Local 157* did not involve trespass, but rather involved a tortious interference with business relations claim. 519 F. Supp. 705 (D. N.Y. 1981). Finally, the court in *Hillhaven* ultimately held that the NLRA preempted the trespass lawsuit there. 41 Cal. App. 4th 11.

<sup>16</sup> While Walmart (Opening Brief at 27-28) attempts to characterize *Belknap* as stating that the *Sears* Court held that the trespass lawsuit there was preempted because of the deeply rooted exception and not because the issues in the lawsuit and NLRA violation were not identical, the language the *Belknap* Court used shows otherwise. The Court stated:

in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), we held that a state trespass action was permissible and not pre-empted since the action concerned only the location of the picketing while the arguable unfair labor practice would focus on the object of the picketing.

In that case, we emphasized that a critical inquiry applying the *Garmon* rules, where the conduct at issue in the state litigation is said to be arguably prohibited by the Act and hence the within the exclusive jurisdiction of the NLRB, is whether the controversy presented to the state court is identical with that which could be presented to the Board. There [under the facts of *Sears*] the state-court and Board controversies could not fairly be called identical.

This is also the case here [in *Belknap*].

463 U.S. at 510 (emphasis added).

**v. Courts hold that the NLRA preempts trespass lawsuits.**

In *Hillhaven*, for example, the court held that the NLRA preempted the trespass lawsuit because the NLRA arguably prohibited the trespass events. 49 Cal. Rptr. 2d 11. Courts thus have held that the NLRA preempts trespass cases.<sup>17</sup> *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1178-79 (D.C. Cir. 1993).

**vi. Concerns over property rights do not come within the deeply rooted exception to the NLRA preemption rule.**

Walmart's reliance on a concurrence in *Taggart v. Weinacker's, Inc.*, to assert that the NLRA does not preempt its trespass lawsuit because of Walmart's property rights is misplaced. 397 U.S. 223, 227 (1970). *Taggart* was a *per curiam* decision that dismissed the writ of certiorari on procedural grounds and reached no substantive issue. 397 U.S. at 226. Nevertheless, the decision reveals that there were two votes to hold that the NLRA preempted the company's trespass lawsuit to one vote for preemption.

In their concurrence, Justices Black and Harlan "would [have]

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<sup>17</sup> *Cranshaw Construction v. Int'l Ass. Of Bridge, Structural and Ornamental Ironworkers, Local 7*, 891 F. Supp. 666, 674-75 (D. Mass. 1995) (NLRA preempted trespass lawsuit that involved "nonviolent interference with the company's operations," whereas NLRA did not preempt trespass claim that involved vandalism or property destruction); *Cross Country Inn v. South Cent. Dist. Counc. United Bhd. Carpenters & Joiners of Am.*, 552 N.E.2d 232 (Oh. App. 1989); *Wiggins & Co. v. Retail Clerks Union L. 1557*, 595 S.W.2d 802 (Tenn. 1980); *Riesbeck Food Markets v. UFCW Local 23*, 404 S.E.2d 404, 406, 411 (W. Va. 1991); *Shirley v. Retail Store Employees Union*, 592 P.2d 433 (Kan. 1979).

h[e]ld under [*Garmon*] that the State's jurisdiction in the case [was] preempted by the National Labor Relations Board's primary jurisdiction over labor disputes." 397 U.S. at 227. In a separate memorandum, Justice Harlan stated that the NLRA preempted the company's trespass lawsuit because the *Garmon* "Court concluded, in the broadest terms, that conduct that is either 'arguably protected' or 'arguably prohibited' under the federal labor laws is not subject to regulation by the States."<sup>18</sup> 397 U.S. at 229.

Indeed, rather than leaving the property rights issue solely to state courts, the Labor Board routinely interprets, considers and issues orders balancing and protecting property rights under state property and trespass law, in addition to focusing on coercion of workers. *See, e.g., Roundy's Inc. v. NLRB*, 674 F.3d 638, 643, 644-46, 649-50 (7th Cir. 2012) (Labor Board interpreted state property law to determine if company's property rights entitled it to exclude union representatives and collecting Labor Board cases interpreting state property law).

To determine whether a company lawfully excluded union representatives, the NLRB considers whether the company possessed

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<sup>18</sup> The Washington cases Walmart cites are inapposite: *Proctor v. Huntington*, 196 Wn.2d 491, 238 P.3d 1117 (2010); *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993); *Arnold v. Melani*, 75 Wn.2d 143, 449 P.2d 800 (1968). None of these cases involved NLRA preemption or, more specifically, whether real property rights fits within the deeply rooted exception to *Sears* preemption.

property rights “which *entitled* it to exclude individuals from the property.” *Walmart*, 337 NLRB 289, 292 (2001), *enf. den. on other grounds*, 354 F.3d 870 (2004), *quoting Indio Grocery*, 323 NLRB 1138, 1141 (1997), *enf’d sub nom.*, *NLRB v. Calkins*, 197 F.3d 1080 (9th Cir. 1999), *cert. den.*, 529 U.S. 1098 (2000).<sup>19</sup> “In determining the character of an employer’s property interest,” “the Board examines relevant record evidence — including the language of a lease or other pertinent agreement — in conjunction with the law of the state in which the property is located.” *Wild Oats*, 336 NLRB at 180.<sup>20</sup>

Similarly, the Labor Board and its administrative law judges

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<sup>19</sup> See also *Hearn Constr.*, 354 NLRB 289, 29 (2009); *Harco Asphalt Paving, Inc.*, 353 NLRB 661, 665 (2008); *George Mee Memorial Hospital*, 348 NLRB 327, 349 (2006); *A&E Food Co. 1, Inc.*, 339 NLRB 860, 863 (2003); *Wild Oats*, 336 NLRB at 180; *UCSF Stanford Health Care*, 335 NLRB 488, 493 (2001), *enf. den. on other grounds*, 325 F.3d 334 (D.C. Cir. 2003), *cert. den.*, 540 U.S. 1104 (2004); *Snyder’s of Hanover, Inc.*, 334 NLRB 183, 183 (2001); *Farm Fresh, Inc. t/a Nicks’*, 326 NLRB 997, 1001 (1998), *pet. for rev. granted sub. nom.*, *UFCW Local 400 v. NLRB*, 222 F.3d 1030 (D.C. Cir. 2000); *Mr. Z’s Food Mart*, 325 NLRB at 882, *pet. for rev. granted on other grounds*, 265 F.3d 239 (4th Cir. 2001); *O’Neil’s Markets, Inc.*, 318 NLRB at 649-650 (1995), *enf’d in rel. part*, 153 L.R.R.M. (BNA) 2291 (8th Cir. 1996); *PayLess Drug Stores*, 311 NLRB 678 (1993), *enf. den. on other grounds* (9th Cir. May 8, 1995) (unpublished); *Bristol Farms, Inc.*, 311 NLRB 437, 438-39 (1993).

<sup>20</sup> See also *Airport 2000 Concessions, LLC*, 346 NLRB 958, 970 (2006); *In re Macerich Management Co.*, 345 NLRB 514, 515 (2005), *enf’d in rel. part*, 540 F.3d 957 (9th Cir. 2008), *cert. den.*, 130 S.Ct. 553 (Nov. 09, 2009); *Equitable Life Insurance of the U.S.*, 343 NLRB 438, 439 (2004), *enf’d sub. nom.*, *Fashion Valley Mall, LLC v. NLRB*, 524 F.3d 1378 (D.C. Cir. 2008); *UCSF Stanford Health Care*, 335 NLRB at 493, *enf. den. on other grounds*, 325 F.3d 334 (D.C. Cir. 2003), *cert. den.*, 540 U.S. 1104 (2004); *Farm Fresh*, 326 NLRB at 1001, *pet. for rev. granted sub. nom.*, *UFCW Local 400 v. NLRB*, 222 F.3d 1030 (D.C. Cir. 2000); *Mr. Z’s*, 325 NLRB at 882, *pet. for rev. granted on other grounds*, 265 F.3d 239 (4th Cir. 2001); *Indio Grocery*, 323 NLRB at 1141, *enf’d sub nom.*, *NLRB v. Calkins*, 197 F.3d 1080 (9th Cir. 1999), *cert. den.*, 529 U.S. 1098 (2000); *O’Neil’s Markets*, 318 NLRB 646, 649 (1995), *enf’d*, 95 F.3d 733 (8th Cir. 1996).

interpret and apply trespass law. For example, in *Copper River of Boiling Springs, LLC*, in determining whether a worker was a trespasser and whether the company's action with respect to that worker violated the NLRA, an administrative law judge explained that the “essence of trespass is an entering or presence on property without permission.”<sup>21</sup> 360 NLRB No. 60, slip op. at 9 (Feb. 28, 2014).

**vii. The trial court correctly held the suit preempted and therefore correctly did not reach the motion to strike under the Anti-SLAPP statute.**

Because of the foregoing, the trial court correctly held that the supremacy clause preempts Walmart’s trespass action, as well as the application of Washington anti-SLAPP statute to the suit. VRP (9/16/13) 17:14-15. See also, VRP (9/16/13) 3:25-4:5, 14:16-19 (citing *Fielder v.*

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<sup>21</sup> See also *Laborers’ International Union of North America, Local 872, AFL-CIO*, 359 NLRB No. 117, slip op. at 3-4 (May 03, 2013) (Labor Board examined whether a worker trespassed or whether the company violated the NLRA when it took action against the worker); *Embarq Corp.*, 358 NLRB No. 134, slip op. at 9 (Sept. 14, 2012) (considering whether picketers trespassed or company violated the NLRA when it interfered with the picketing); *Reliant Energy*, 357 NLRB No. 172, slip op. at 12 (Dec. 30, 2011) (dissent argued that a worker did not interfere with the company’s property rights because worker did not trespass); *NOVA Southeastern University*, 357 NLRB No. 74, slip op. at 26 (Aug. 26, 2011) (discussing whether company revoked or limited a handbiller’s invitation so that the handbiller trespassed); *Acme Bus Corp.*, 357 NLRB No. 82, slip op. at 47 (Aug. 26, 2011) (administrative law judge discussed whether company directed handbiller to leave property and whether handbiller complied or trespassed); *Roundy’s Inc.*, 356 NLRB No. 27, slip op. at 24 (Nov. 12, 2010) (administrative law judge analyzed whether company had sufficient rights under its lease and Missouri property law to charge handbillers with trespass); *In re Hacienda Hotel, Inc.*, 355 NLRB 950, 950 n. 3 (2010) (NLRB analyzed whether company held sufficient property rights under state law to charge organizers with trespass).

*Sterling Park Homeowners Ass'n*, 914 F. Supp. 2d 1222 (W.D. WA 2012) and *Bulletin Displays, LLC v. Regency Outdoor Advertising, Inc.* 448 F. Supp. 2d 1172, (C.D. Cal. 2006)).

**B. SHOULD THIS COURT HOLD THAT THE STATE TRESPASS CLAIM IS NOT PREEMPTED, THE CASE SHOULD BE REMANDED FOR CONSIDERATION OF THE MERITS OF THE MOTION TO STRIKE.**

Walmart contends that its suit is not preempted and inappropriately invites this Court to decide the Motion to Strike under the Anti-SLAPP statute without the benefit of the trial court's evaluation of the evidence and ruling on that issue. (Opening Brief, at 35-36) (citing *Carpenter v. Elway*, 97 Wn. App. 977, 1016, 988 P.2d 1009 (1999)). Walmart's reliance on *Carpenter* is misplaced.

In that case, the trial court had erred in holding it lacked jurisdiction and therefore did not reach an issue in the case because of its erroneous jurisdictional ruling. Because the issue the trial court had not addressed was one solely of law, in the interest of judicial economy the Court of Appeals took up the purely legal issue and decided it on appeal. *Carpenter*, 97, Wn. App. at 1016. Here, of course, the issue left unaddressed by the trial court is not one purely of law. See, e.g., *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1109 (W.D. Wash. 2010) (In making this determination of whether to grant a motion to strike

pursuant to RCW 4.25.525, “the court shall consider pleadings and **supporting and opposing affidavits stating the facts upon which the liability or defense is based.**”) (emphasis supplied).

Analysis of an Anti-SLAPP motion requires a two-step process. A party bringing a special motion to strike a claim under RCW 4.24.525(4)(a) has the initial burden of showing by a preponderance of the evidence that the claim is based on an action “involving public participation and petition,” as defined in RCW 4.24.525(2). If the moving party meets this burden, the burden shifts to the responding party “to establish by clear and convincing evidence a probability of prevailing on the claim.” RCW 4.24.525(4)(b). The burden of proof Walmart bears on “the clear and convincing evidence of a probability of prevailing on a claim is applied in a manner similar to the summary judgment standard.” *Spratt v. Toft*, 2014 WL 1593133 at \* (Wn. Ap. April 21, 2014).

In *Spratt*, this Court reversed the trial court’s holding that the defendant had failed to make out the first prong of the test. *Spratt*, 2014 WL 1593133 at 5. Because the trial court had not reached the second prong, it remanded the case to the trial court:

Having determined that Toft has met the threshold burden of the anti-SLAPP statute, the burden shifts to Spratt to show, by clear and convincing evidence, a probability of prevailing on her defamation claim.<sup>20</sup> If Spratt meets this burden, then Toft’s motion to strike her claim must be

denied. RCW 4.24.525(4)(b). Because the trial court did not address this secondary question, we remand for consideration of whether Spratt establishes a probability of prevailing by clear and convincing evidence. Indeed the court's oral ruling specifically states that it did not decide the merits of the case, but only whether the defamation lawsuit should be stricken. The trial court's ruling shows that it never examined the statements and declarations to determine whether triable issues of material fact existed under any standard.

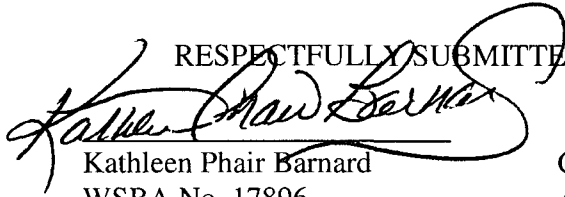
*Spratt*, 2014 WL 1593133 at 5.

Here, the trial court has not examined the voluminous declarations, videos and documentary evidence submitted to determine whether triable issues of material facts exist on the anti-SLAPP issues. This function of this Court “is to review the action of the trial courts. Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact ... .” *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009).

## **V. CONCLUSION**

Because of the foregoing, this Court should affirm.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of May, 2014.



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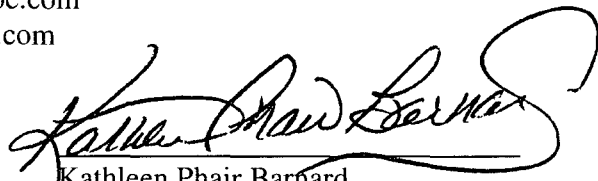
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I hereby certify that on this 27th day of May, 2014, I caused the foregoing Appellees' Answering Brief to be emailed to, and a copy deposited in the U.S. mail, first class, addressed to:

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# APPENDIX

ORIGINAL TRANSCRIPT

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS  
DIVISION 4

WAL-MART STORES, INC.

PLAINTIFF

CASE NO. CV-2013-0709-4

v.

UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION,  
ORGANIZATION UNITED FOR RESPECT  
AT WALMART ("OUR Walmart"), and  
DOES 1-10

DEFENDANTS

PROCEEDINGS

Proceedings held before the Honorable John R.  
Scott, Circuit Judge at Benton County Circuit Court,  
Bentonville, Arkansas on June 3rd, 2013, at 2:51 p.m.

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1 MR. BAILIFF: All rise.

2 JUDGE SCOTT: Be seated, please. The next  
3 matter to come before the Court is the case of *Wal-*  
4 *Mart Stores, Inc. v. United Food and Commercial*  
5 *Workers International Union, Organize --*  
6 *Organization United For Respect at Wal-Mart ("OUR*  
7 *Wal-Mart")*, and *Does 1 through 10*. This is Case  
8 No. CV-2013-709. The plaintiff is represented by  
9 Marshall Nye. Mr. Nye, who is with you there at  
10 the counsel table?

11 MR. NYE: Your Honor, I have Mr. Steven Wheel  
12 -- Wheelless with me. And I believe the Court has  
13 signed a Pro Hac Order admitting Mr. Wheelless  
14 today.

15 JUDGE SCOTT: I have. Welcome to Division 4,  
16 Mr. Wheelless.

17 MR. WHEELLESS: Thank you, sir. Good  
18 afternoon.

19 JUDGE SCOTT: Which one of you-all will be  
20 doing the talking today?

21 MR. NYE: Your Honor, I'm going to start. And  
22 depending on where it goes from there, Mr. Wheelless  
23 may join in.

24 JUDGE SCOTT: Okay. Thank you. The defendant  
25 is represented by Charles Kester. Mr. Kester, who

1 complaint -- to our complaint and this TRO.

2 JUDGE SCOTT: Did Wal-Mart file anything  
3 before the Board?

4 MR. WHEELLESS: Wal-Mart did file a charge  
5 before the Board. And not contained in the papers  
6 that were provided to you, is -- is Wal-Mart's  
7 withdrawal of all of the ULP charges that relate to  
8 state trespass actions.

9 MR. KESTER: Well, I'm going to object.  
10 That's -- that's a mischaracterization. I handed  
11 the Court two different charges that were given by  
12 Wal-Mart. The first one included both the store --  
13 the Arkansas store actions that are included in the  
14 complaint. The second one withdrew those specific  
15 Arkansas charges. All those complaints remain  
16 pending before the NLRB. And the charges that do  
17 remain pending before the NLRB, even under the  
18 First Amended Complaint that --

19 JUDGE SCOTT: Hang on, Mr. Kester. Have a  
20 seat. You'll have a chance to talk. All right.

21 MR. WHEELLESS: And there -- there may be some  
22 problem with terminology. A lot of people think of  
23 charges filed with the administrative agencies,  
24 they -- they use the label "complaint." Not true.  
25 There's only -- under the National Labor Relations

1 Act, there's only one authority that can issue a  
2 complaint, and that is the general counsel's  
3 office. Wal-Mart filed charges against the UFCW  
4 several months ago related to the coercive effect  
5 of these in-store invasions. Wal-Mart withdrew,  
6 though, all charges with respect to these in-store  
7 invasion or property intrusions precisely because  
8 it chose this forum for and state court actions for  
9 trespass rather than the NLRB process.

10 JUDGE SCOTT: All right.

11 MR. WHEELLESS: Thank, Your Honor.

12 JUDGE SCOTT: All right. Mr. Kester?

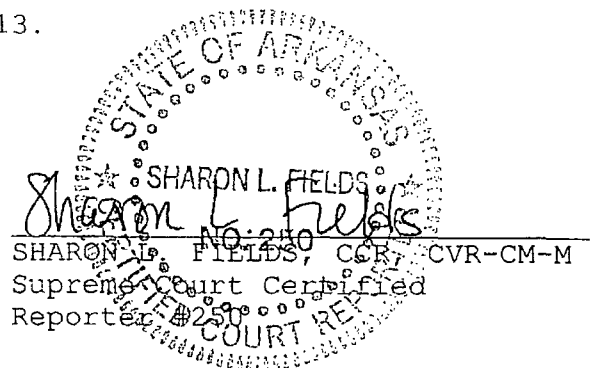
13 MR. KESTER: Well, I think that last comment  
14 was exactly right. I mean, Wal-Mart is engaged in  
15 blatant forum shopping and -- and prefers to be  
16 here in front of the NLRB. And the reason why they  
17 prefer that is because the charges that Wal-Mart  
18 filed have no merit in front of the NLRB. Charges  
19 that are filed by the UFCW do have merit in front  
20 of the NLRB. And they would prefer to -- to come  
21 here rather than have it come down that way in  
22 front of the NLRB.

23 There's -- I think the bottom line here is  
24 that Judge Spears, in his order on the preliminary  
25 injunctive relief, got it exactly right. Let the

## CERTIFICATE OF COURT REPORTER

I, Sharon L. Fields, Official Court Reporter for the Circuit Court, Division II, 19th Judicial District West, certify that I prepared the clerk's record as designated in the case of *Walmart Stores, Inc, et al v. United Food and Commercial Workers International Union, et al*, Benton County Circuit Court No. CV-2013-709-4, before the Honorable John Scott, Judge thereof, at Bentonville, Arkansas; that said record has been reduced to a transcript by me, and the foregoing pages numbered 1 through 672 constitute a true and correct record as designated to the best of my ability, along with all items of evidence admitted into evidence. The cost incurred by Defendants for the designated portion of the clerk's record was \$1,848.00.

WITNESS my hand and seal as such Court Reporter on this 31st day of December, 2013.



ORIGINAL TRANSCRIPT

C E R T I F I C A T E

I, THERESE M. OLENBERGER, Official Court Reporter for the Circuit Court of the Nineteenth West Judicial District of Arkansas, Division IV, certify that I recorded the proceedings by masked recording in the matter of WAL-MART STORES, INC., WAL-MART STORES ARKANSAS, LLC, WAL-MART STORES EAST, LP, WAL-MART REALTY COMPANY, WAL-MART REAL ESTATE BUSINESS TRUST, SAM'S WEST, INC., and BEAVER LAKE AVIATION, INC. v. UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, ORGANIZATION UNITED FOR RESPECT AT WAL-MART ("OURWalmart"), and DOES 1-10, Benton County No. CIV-2013-0709-4, on the 3rd day of June, 2013; and the 21st day of November, 2013, before the Honorable John R. Scott, Circuit Judge, Judge thereof, at Bentonville, Arkansas; that said recording has been reduced to a transcript by me and the foregoing pages numbered 673 through 734 constitute a true and correct transcript of the proceedings to the best of my ability, along with all items of evidence admitted into evidence.

The cost of my portion of the appeal record is \$190.60; paid by the Defendants.

WITNESS MY HAND AND SEAL as such Court Reporter on this 2nd day of January, 2014.

*Therese M. Olenberger*  
THERESE M. OLENBERGER, CCR No. 644

OFFICIAL STAMP  
THERESE OLENBERGER, CCR  
ARKANSAS SUPREME COURT  
CERTIFIED COURT REPORTER  
LS Certificate No. 644

ORIGINAL TRANSCRIPT

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS  
DIVISION 4

WAL-MART STORES, INC.,  
WAL-MART STORES ARKANSAS, LLC,  
WAL-MART STORES EAST, LP,  
WAL-MART REALTY COMPANY,  
WAL-MART REAL ESTATE BUSINESS  
TRUST, SAM'S WEST, INC., and  
BEAVER LAKE AVIATION, INC.

PLAINTIFFS

CASE NO. CIV-2013-0709-4

v.

UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION,  
ORGANIZATION UNITED FOR  
RESPECT AT WAL-MART  
("OURWalmart"), and DOES 1-10

DEFENDANTS

COSTS

	<u>Plaintiff</u>	<u>Defendant</u>
Clerk's Costs	\$ _____	\$ _____
Sheriff	_____	_____
Witnesses	_____	_____
TOTAL	\$ _____	_____

I, BRENDA DeSHIELDS, Clerk of the said Circuit Court, in and for the county and state aforesaid, do hereby certify that the foregoing pages of typing contain a true and complete transcript of the record had and done in the Circuit Court of the said county in the cause therein stated, and that the above is a true and correct statement of the costs incurred by the respective parties hereto as reflected by the records of my office.

In TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office on this Jan day of 2nd, 2014.



*Brenda DeShields*

Circuit Clerk